No. 86-49

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,

Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENTS AIR PRODUCTS AND CHEMICALS, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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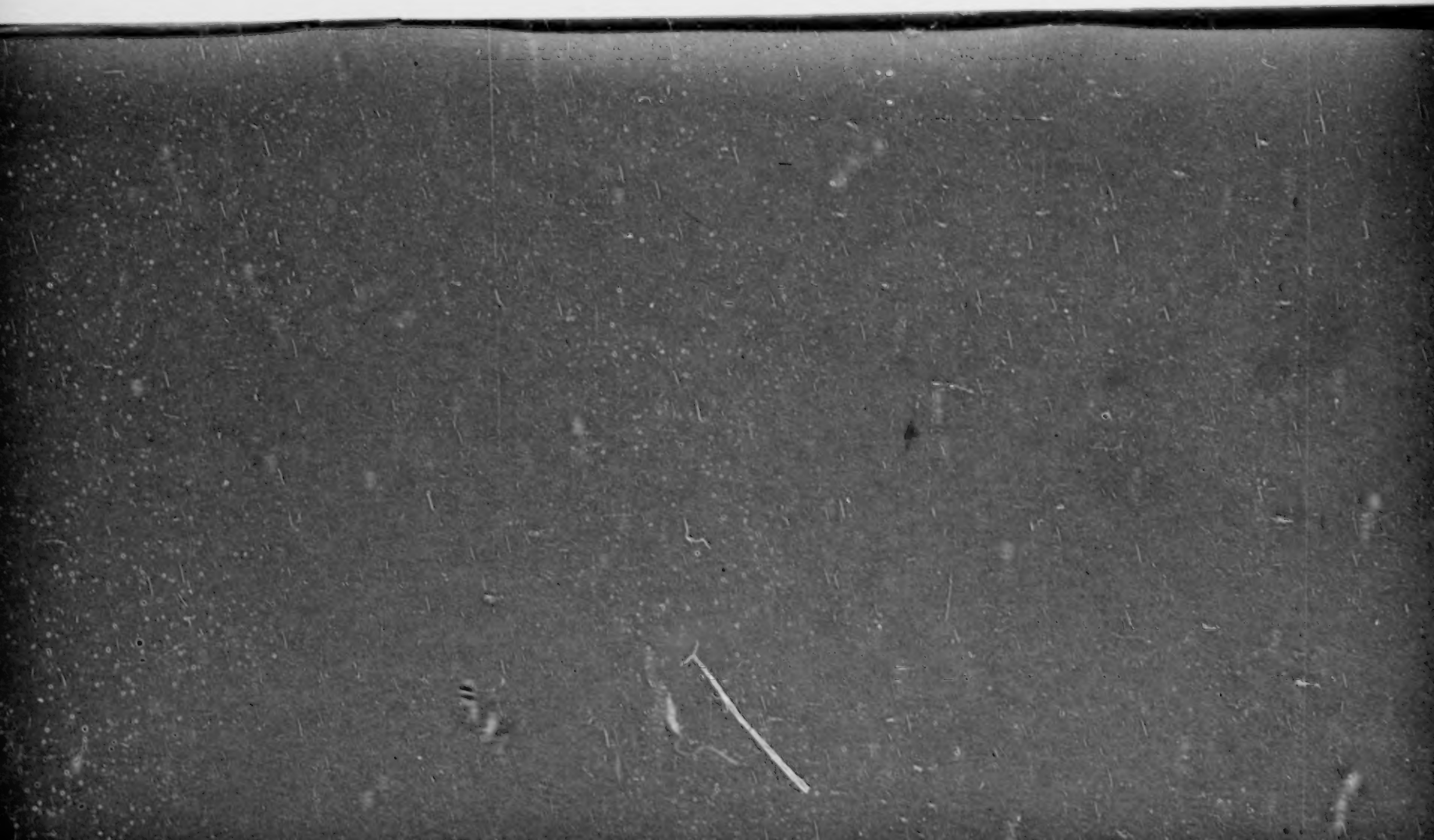

QUESTION PRESENTED

Should this Court grant Certiorari in a case where a federal district court abstained under *Burford* and *Younger* grounds where there was not a colorable preemption claim at the time of the federal district court decison and where a pending state court action involving identical federal issues then proceeded to a final judgment?

STATEMENT REQUIRED BY RULE 28.1

Respondents are Air Products and Chemicals, Inc., Armco, Inc., Ashland Oil, Inc., Huntington Alloys, Inc., Kentucky Electric Steel Company and Pickands Mather & Co. These companies are all members of the Kentucky Industrial Utility Customers ("KIUC"), a group of industrial corporations organized to participate in electric and gas utility matters in Kentucky.

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SUMMARY OF ARGUMENT

The sole issue presented by the Petitioners to the Sixth Circuit Court of Appeals was whether the federal district court correctly applied the *Burford* and *Younger* abstention doctrines. The facts of this case are properly characterized as a prudency of choice case involving two distinct rates filed at the FERC and not as a case where a state commission has refused to give effect to one filed rate at the FERC.

There is no preemption issue which could serve as a basis for denying abstention because the FERC historically declines, and in this case has specifically declined, to take jurisdiction on the prudency issue. All of the cases which Petitioners have cited as being in conflict with the Sixth Circuit involved proceedings where a colorable preemption argument was raised in federal court; this case is thus distinguishable and does not conflict with the other circuits.

Whether or not abstention by the district court was proper, Petitioners have fully and freely litigated all of their federal claims in state court, rendering moot through res judicata principles any issues which could be decided by a federal district court.

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STATEMENT OF THE CASE

This case is depicted by American Electric Power Company, Inc. ("AEP") et al., Petitioners, as conflicting with cases arising in the Third, Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits. (Petition at 2). The Kentucky Public Service Commission ("Kentucky Commission") is described as "parochial" and is portrayed as refusing to give effect to "governing FERC [Federal Energy Regulatory Commission] rate schedules." (*Id.*). However, we believe this case is unique

because there is no colorable preemption issue and the case has already gone to a final judgment in a state administrative proceeding and to a final judgment in state court in a second, independent, proceeding. This uniqueness prevents the Sixth Circuit's decision from even facially resembling decisions of the other circuits.

The Petitioners set up the problem as involving the wrongful refusal of the Kentucky Commission to follow one "filed rate" (Unit Power Agreement) at the Federal Energy Regulatory Commission ("FERC"). Petitioners also argue here that the Kentucky Commission had no jurisdiction to interpret the basic FERC rate schedule that applies to the AEP companies, the System Interconnection Agreement.

The Petition provides no analysis of what it means to have a "filed rate" at the FERC. The reader is thus left with the erroneous impression that merely because the FERC has accepted a rate for filing, then the FERC takes jurisdiction over the question of whether the agreement is prudent. However, the FERC has repeatedly held that it will not rule on prudence. *Southern Company Services, Inc.*, 26 FERC (CCH) ¶ 61,360 at 61, 796 (1984); *Pennsylvania Power and Light Co.*, 23 FERC (CCH) ¶ 61,006 at 61,019 (1983).

Petitioners give only slight reference to the fact that in determining not to grant costs based upon the Unit Power Agreement, the Kentucky Commission *did* grant costs based upon the AEP System Interconnection Agreement. This Agreement *requires* payments based on average costs of the Surplus Members and was recently approved by the United States Sixth Circuit Court of Appeals, after years of examination into the very issues which are now again raised. *Ohio Power Co.* v. *FERC*, 668 F.2d 880 (6th Cir. 1982). Petitioners state:

> "The Kentucky Commission took this action [ruling on prudency] despite the fact that the Unit Power Agreement is the 'filed rate' and that *in Kentucky Power's view* the System Interconnection Agreement had required Kentucky Power to enter into that Unit Power Agreement. In any event, FERC has exclusive jurisdiction to construe the System Interconnection Agreement and to allocate low-cost and higher-cost power supplies among the AEP companies." (Petition at 5) (Emphasis added).

In presenting their Statement of the Case, Petitioners do not develop the factual background concerning the System Interconnection Agreement nor do they point out that from August 27, 1982 to August 2, 1984 Kentucky Power itself elected to take the position that it was the *obligation* of the Kentucky Commission to interpret the System Interconnection Agreement and to follow *it* as the filed rate.

Factual Background

The AEP System Interconnection Agreement was initially approved by the Federal Power Commission (the predecessor to FERC) in 1951 and has been amended several times since. The Agreement requires those members with less than their pro-rata share of total system generating capacity (Deficit Members) to make monthly payments to those members with more than their pro-rata share of total system generating capacity (Surplus Members). In return for making these monthly payments to Surplus Members, Deficit Members are supplied with electric power to meet their customers' needs from the AEP Pool. Kentucky Power is a Deficit Member. At the present time and for the past several

years the AEP Pool has possessed huge amounts of excess generating capacity so that there has been and there continues to be no drain on the AEP Pool by virtue of the fact that Kentucky Power is a Deficit Member.

Rockport Generating Facility

Initially, it was planned that Indiana and Michigan Electric Company ("I&M"), one of the AEP Member Companies, would own 100% of the Rockport Generating Units, described by Petitioners at page four of their Petition. AEP subsequently concluded that Rockport should be owned 50% by I&M, 15% by Kentucky power, and 35% by AEP Generating Company, another wholly-owned subsidiary of AEP. This decision required the permission of the Kentucky Commission under KRS 278.020 ("Certificate of convenience and necessity required for construction or operation of utility; exceptions; approval of commission required for acquisition or transfer of ownership of utility." (App. 1a).

From 1978 through 1984 Kentucky Power fruitlessly sought authorization from the Kentucky Commissioin to purchase a 15% ownership interest in the Rockport generating plants. In one instance the Commission's Order was appealed to, and remanded by, the Kentucky Court of Appeals (App. 3a) solely to look at the System Interconnection Agreement.

In this Order of August 27, 1982 the Court found:

> "The integrated AEP System Pool Agreement is crucial to the factual determination by the Commission."
>
> "In order to determine on appeal that Kentucky Power is treated fairly in relation to the other members of the AEP pool, it is necessary to have the document of record . . ."

"The testimony should then be tested against the Agreement itself." (App. 5a-6a).

Kentucky Power and AEP did not appeal this Order and did not argue, as they do now, that the FERC has exclusive jurisdiction to construe the System Interconnection Agreement. They did not even allege that the FERC had primary jurisdiction to interpret the Interconnection Agreement. Instead they made an *election* dutifully to submit the System Interconnection Agreement for analysis by the Kentucky Commission and presented live witnesses in support of their interpretation of that Agreement in proceedings before the Kentucky Commission. On August 2, 1984, the Kentucky Commission issued a Revised Order on Remand denying Kentucky Power's application to purchase Rockport. Kentucky Power did not appeal the August 2, 1984 Order.

The same day Kentucky Power was denied authority to *own* 15% of Rockport, it filed with the FERC a Unit Power Agreement whereby it simply contracted to *buy* 15% of the output of Rockport from its sister company: the AEP Generating Company. The unit Power Agreement is the same as the outright purchase of an ownership interest in Rockport since under either scenario Kentucky Power would be financially responsible for 15% of all Rockport costs and entitled to receive 15% of all Rockport power. The mere filing of this Unit Power Agreement, Petitioners now argue, has the legal effect of overturning the findings in the Kentucky Commission's August 2, 1984 Order and a subsequent Order entered December 4, 1984.

On October 1, 1984 the FERC issued an Order stating that the Kentucky Commission had jurisdiction to consider the appropriateness of Kentucky Power's acquisition of new facilities and that the regulatory roles of the

FERC and the Kentucky Commission did not conflict or overlap. *AEP Generating Co.*, 29 FERC (CCH) ¶ 61,002 at 61,003 (1984).

On November 23, 1984 the FERC issued another Order in the Kentucky Power Unit Power case clarifying its prior Order and resolving questions regarding the extent of FERC's jurisdiction in light of the extensive proceedings that had already occurred before the Kentucky Commission. In *AEP Generating Co.*, 29 FERC (CCH) ¶ 61,246 at 61,501 (1984), the FERC held that its jurisdiction was limited to determining only what a reasonable rate for the sale of power from Rockport would be in light of Rockport costs. The FERC further declared:

> "[I]n this proceeding we do not intend to make or consider any findings concerning [Kentucky Power's] prudence in entering the agreement, in light of the availability of alternative power supplies." *Id.*

On December 4, 1984, the Kentucky Commission issued an Order in a Kentucky Power rate case which reaffirmed the conclusion in its August 2, 1984 Order that Kentucky Power had continuing authority under the terms of the System Interconnecton Agreement to purchase additional capacity and energy to meet its customers' demands from the AEP Pool. The Kentucky Commission held that Kentucky Power had acted imprudently in acquiring much more expensive capacity by means of the Unit Power Agreement. The Kentucky Commission partially denied Kentucky Power's request to increase its rates to reflect the difference between the cost of acquiring capacity from the AEP Pool under the FERC approved AEP System Interconnection Agree-

ment and the cost of acquring Rockport capacity under the terms of the Unit Power Agreement also then on file at the FERC. However, the Kentucky Commission did allow Kentucky Power an additional $14 million in rates to account for the fact that Rockport was now a part of the AEP Pool and that as a Deficit Member, Kentucky Power had an obligation to make increased payments to the AEP Pool.

Proceedings In Lower Courts

Petitioners filed this suit in federal district court on December 12, 1984, eight days after the Kentucky Commission entered its second Order interpreting the Interconnection Agreement and 112 days after the appeal time had run from the Kentucky Commission's first Order interpreting the Interconnection Agreement. However, another eight days after that, on December 20, 1984, Kentucky Power elected to submit the identical case to the Kentucky state courts by filing a complaint in the Franklin Circuit Court which raised all federal issues, state issues, and sought injunctive relief under KRS § 278.410(3). (App. 9a).

The Franklin Circuit Court is a court of special expertise in utility matters and all appeals from the Kentucky Commission are required by Kentucky law to be heard there. KRS 278.410(1). (App. 9a) Kentucky Power's state court action was filed without any motion or letter reserving the federal issues for later determination in the federal court. Similarly, no other party reserved the federal issues for federal court.

This December 20, 1984 state court filing by Kentucky Power was not at that time made under the duress of an adverse ruling in federal court, but was made

totally voluntarily, since it was not until January 16, 1985 that the federal district court, *noting the existence of the ongoing state proceeding*, abstained. The Sixth Circuit Court of Appeals affirmed the district court by Order issued March 24, 1986, again relying heavily on the fact that there was an ongoing state proceeding.

All major procedural events took place in the Kentucky state court (the full procedure in this case is indicated by the attached docket sheet (App. 10a)) culminating in an Order upholding the Kentucky Commission's interpretation of the System Interconnection Agreement and ruling on the federal claims of Kentucky Power. (App. 16a).

REASONS FOR NOT GRANTING THE WRIT

A. Burford & Younger Abstention Doctrines

In *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), this Court set up two standards as a basis for abstention: First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and second, the existence of a state-created forum with specialized competence in the particular area. *See Ada-Cascade Watch Co.* v. *Cascade Resource Recovery*, 720 F.2d 897 (6th Cir. 1983). "The purpose of *Burford* abstention is to avoid federal intrusion into matters of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers* v. *Public Service Comm'n of Nevada*, 614 F.2d 206 (9th Cir. 1980). *Burford* abstention is particularly appropriate in light of the great interest that states have in regulating retail utility rates within their

boundaries. *See Arkansas Elec. Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983). While "supremacy claims are 'essentially one[s] of federal policy' so that 'the federal courts are particularly appropriate bodies for the application of preemption principles,' " *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 185 (3rd Cir. 1980), *Burford* abstention is proper where detailed fact finding is required to evaluate a plaintiff's claim of preemption. *Aluminum Co. of America* v. *Utilities Comm'n* v. *Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984).

In order for abstention to be proper under *Younger* v. *Harris*, 401 U.S. 37 (1971), a three-prong test must be satisfied. "First, there must be an ongoing state judicial proceeding. Second, the proceeding must implicate important state interests. Third, there must be an opportunity in the state proceeding to raise the federal constitutional challenge." *Coruzzi* v. *State of New Jersey*, 705 F.2d 688, 690 (3rd Cir. 1983). Just as with *Burford* abstention, preemption is the critical element in determining whether *Younger* abstention is appropriate. "The legitimate state interest contemplated by *Younger*, *see Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982), . . . does not exist when the state action has been preempted or foreclosed by the Constitution " *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985); *see also Champion Int'l Corp.* v. *Brown*, 731 F.2d 1406 (9th Cir. 1984); *Baggett* v. *Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521 (11th Cir. 1983).

B. No Colorable Preemption Claim

The instant case does not present a colorable preemption claim which is the *sine qua non* to avoiding abstention in the cases cited by Petitioners. Indeed this case demonstrates that a high degree of cooperation and respect existed between the federal and the state regulatory agencies during the relevant time period. Such cooperation and respect existed at no time in the cases cited by Petitioners.

On December 4, 1984 the Kentucky Commission determined that Kentucky Power had the option of obtaining power under either of *two* rates on file at the FERC: (1) obtaining it from the AEP Pool under the System Interconnection Agreement; or (2) obtaining it directly from Rockport under the Unit Power Agreement. The Kentucky Commission concluded that purchasing power from the AEP Pool was the more prudent option. The Kentucky Commission's ruling or prudency could in no way be deemed to conflict with the FERC since the FERC specifically declined to rule on prudency and there was thus no preemption question which could serve as the basis for denying *Burford* or *Younger* abstention.

To put it another way, since the FERC itself, while acknowledging that there were two filed rates, quite properly refused to make a value judgment comparing the two FERC filings of Kentucky Power, this area of inquiry and determination — always a proper subject for state commission review, in our view — was left rather clearly to the state public service commission by the FERC.

Viewed this way, the federal district court and the Sixth Circuit Court of Appeals really had no underlying federal case to hear at the time they ruled. Thus, the ap-

plication of the abstention doctrine by the federal courts was proper as there was no preemption question as to which regulatory body should rule on the prudency issue.[1]

C. A Final State Court Judgment On All Federal Issues Now Renders A Federal Action At The District Court Moot.

In light of the unappealed administrative Kentucky Commisison Order of August 2, 1984 and the separate state court Order of March 24, 1986, (issued after briefing and oral argument at the Sixth Circuit and issued the same day as the Sixth Circuit Court's Order) a new issue has arisen: mootness. It would now be futile for this Court to review the Sixth Circuit's application of the abstention doctrine. Decisions of this Court have addressed the ultimate question which is now presented: whether a federal court that initially abstained from hearing a case may then hear that same case after the federal issues have been fully litigated and decided in state court.[2]

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[1] By Orders issued August 20, 1986, in *AEP Generating Co.*, 36 FERC (CCH) ¶ 61,226 (1986) and *Kentucky Power Co.*, 36 FERC (CCH) ¶ 61,227 (1986), the FERC has further elaborated upon its above stated position that its role in the Kentucky Power Unit Power case would be limited to determining whether the Rockport sale to Kentucky Power was at a reasonable rate based on Rockport costs, and not whether there was a more economical option available to Kentucky Power. The FERC may have now attempted to examine whether Kentucky Power should be required to purchase Rockport power. Notwithstanding the legal effect of these Orders by the FERC, at the time the federal courts abstained, there was no valid preemption claim.

[2] At page 11 of its Petition, Kentucky Power attempted to address the question of the effect of concurrent jurisdiction. In support of its implication that it should be able to continue with its federal case even though there has been a final decision in an identical state court proceeding which it in-

In *England* v. *Louisiana medical Examiners*, 375 U.S. 411 (1964), plaintiffs brought suit in federal district court seeking an injunction and declaration that a certain state statute, as applied to them, violated the Fourteenth Amendment. A three judge federal district court invoked the principles of abstention.

Plaintiffs then brought suit in state court where they also sought injunctive and declaratory relief and where they unreservedly submitted their federal claim for decision. The state proceedings terminated with a decision by the Louisiana Supreme Court declining to review an intermediate appellate court's holding that the statute did not violate the Fourteenth Amendment. The plaintiffs then returned to federal district court, which dismissed the complaint on the grounds that the Louisiana state courts had passed on all the issues raised.

On direct appeal, this Court held (prospectively) that a litigant in federal court who is remitted to a state court under the doctrine of abstention may preserve his right to return to federal court for the disposition of his federal contentions only by refusing to litigate his federal contentions in state court.

In *England*, the Court stated:

> ". . . We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there,

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itiated, Kentucky Power cited *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3rd Cir. 1986) and *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). However, these cases involved situations where it was held that a federal court maintained concurrent jurisdiction even though the same claim was *pending* in a state court. In neither of these cases was there a *final judgment* in state court. Thus, neither of these two cases have any bearing here.

> and has them decided there, then — whether or not he seeks direct review of the state decission in this court — he has elected to forego his right to return to the district court." *Id.* at 418-19.

The Franklin Circuit Court has already ruled on all the claims voluntarily presented by Kentucky Power, including its federal claims. Even if this Court now determined that abstention was improper on January 16, 1985, because all federal issues have since been passed upon on March 24, 1986 in state court, upon remand, the federal court would be forced to dismiss the action.[3]

In light of the above, the federal district court is bound by the doctrine of res judicata. This Court has recently held that the findings of fact rendered in a state administrative proceeding which was not appealed and therefore was not reviewed by a state court should nevertheless be given preclusive effect by a federal court. *University of Tennessee* v. *Elliot*, 106 S.Ct. 3220, 3227 (July 7, 1986). Thus, the findings of fact made in the August 2, 1984 Order of the Kentucky Commission, which was not appealed by Kentucky Power, would be binding on the federal court upon remand as a foundation for its consideration of the constitutional issues.

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[3] On August 26, 1985, the Judge as well as all of the parties in the state court case signed an Order of Submission which submitted that case to the Franklin Circuit Court for a final decision. (App. 15a) However, by letter dated September 23, 1985, counsel for Kentucky Power indicated that its federal claims were presented in state court only because of the federal district court's abstention and that it planned to pursue its federal claims in district court if it prevailed in its appeal to the Sixth Circuit. This letter request was objected to by counsel for the Kentucky Commission. The Kentucky Power request was disregarded by the state court presumably because it came after Kentucky Power had fully litigated and submitted all of its claims to the court. Kentucky Power's letter request was not made a part of the official record of this case. (App. 15a).

Secondly, the March 24, 1986 ruling by the Franklin Circuit Court, containing both findings of fact and conclusions of law relating to Kentucky Power's constitutional claims, would also be binding on a lower federal court. When a suit is pending in a state and federal court concurrently, both actions may proceed until a judgment is obtained in one court which may then be pleaded as a bar under the res judicata doctrine. *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935).

The fact that the state court decision is currently being appealed does not prevent that judgment from being pleaded as a bar because in Kentucky a judgment is final until reversed or modified. *Small* v. *Reeves*, 76 S.W. 395 (Ky. 1903); *see also Vaughn's Adm'r.* v. *Louisville & N.R. Co.*, 179 S.W.2d 441 (Ky. 1944). Moreover, a judgment which is on appeal can be plead as res judicata and such pleading is binding on a second court even if the judgment in the first case is later overruled. *Reed* v. *Allen*, 286 U.S. 191 (1932). The *Reed* v. *Allen* rule has been adopted by the RESTATEMENT (SECOND) OF JUDGMENTS § 16 (1982).

Because the decision of the Franklin Circuit Court and the findings of the Kentucky Commission are binding in federal court, there would remain for the federal district court no "actual matters in controversy essential to the decision of the particular case before it." *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). The duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6, Oil, Chem. & Atom Wkrs.* v. *Missouri*, 361

U.S. 363, 367 (1960). Because Kentucky Power's federal suit alleges the same claims that have already been decided in state court, "considerations of comity as well as repose militate against redetermination of the issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Montana* v. *United States*, 440 U.S. 147, 163 (1979). Kentucky Power initiated this suit in federal as well as state court and fully litigated all issues in state court. The decisions of the Franklin Circuit Court and the Kentucky Commission are now binding on all of the parties which renders this Petition moot.

CONCLUSION

This case does not conflict with the decisions of the other circuits because of the unique factual and procedural posture of the case which, unlike any of the cases cited by Petitioners, presents no colorable preemption claim. Because all of Petitioners' federal claims have already been decided, the issues in the Petition — i.e., whether the federal district court should have abstained — are now moot.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated September 2, 1986

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APPENDIX

278.020 Certificate of convenience and necessity required for construction or operation of utility; exceptions; approval of commission required for acquisition or transfer of ownership of utility

(1) No person, partnership, public or private corporation or combination thereof shall begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until such person has obtained from the public service commission a certificate that public convenience and necessity require such construction. Upon the filing of an application for such certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part. Unless exercised within one (1) year from the grant thereof, exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.

(2) No utility shall exercise any right or privilege under any franchise or permit, after the exercise of that right or privilege has been voluntarily suspended or

discontinued for more than one (1) year, without first obtaining from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity authorizing the exercise of that right or privilege.

(3) No utility shall apply for or obtain any franchise, license or permit from any city or other governmental agency until it has obtained from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered.

(4) No person under the jurisdiction of the commission shall acquire or transfer ownership of or control, or the right to control, any utility, by sale of assets, transfer of stock or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

OPINION RENDERED: August 27, 1982; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 82-CA-267-MR

STEVEN L. BESHEAR, ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Appellant

v.

PUBLIC SERVICE COMMISSION
COMMONWEALTH OF KENTUCKY AND
KENTUCKY POWER COMPANY
Appellee

Appeal From Franklin Circuit Court
Hon. Henry Meigs, Judge
Civil Action No. 81-CI-1349

REVERSING AND REMANDING

BEFORE: HAYES, Chief Judge, WHITE, and WINTERSHEIMER, Judges.

WINTERSHEIMER, JUDGE. This appeal is from an order issued December 21, 1981, which affirmed a decision of the Public Service Commission granting Kentucky Power Company a certificate of convenience and necessity to acquire a 15% interest in a power plant being built in Rockport, Indiana.

The questions presented are whether the Commission's findings of fact were sufficient to support its order; whether the Commission was required to explain the benefits of the integrated AEP system; whether the Commission violated the statute by granting the company a certificate; and whether the order of the Commission is contradictory.

This is the second appeal of this case. On February 4, 1981, the Kentucky Supreme Court remanded the matter to the Public Service Commission to comply with the directions of the Court of Appeals. The original application requested authority to purchase an undivided 15% interest in a plant under construction by the Indiana and Michigan Electric Company near Rockport, Indiana. Kentucky Power is a wholly owned subsidiary of American Electric Power system (AEP), and is one of eight entities which comprise AEP. Kentucky Power has its headquarters in Ashland, Kentucky. The power pool is dispatched on an economic basis from a central facility in Canton, Ohio.

At a hearing on September 3, 1981, the prepared testimony of six company witnesses was presented emphasizing the benefits of membership in the AEP system. Cross-examination followed. Neither the Consumer Protection Division nor the Commission staff offered any witnesses in opposition to the company application. The Commission determined that the company, by participating in the Rockport project, would be meeting its obligations to the AEP system and the result would be substantial benefits to the company and its customers. The AEP interconnection agreement is not in the record. The Franklin Circuit Court upheld the Commission order. This appeal followed.

This Court reverses the decision of the circuit court and remands this case to the Public Service Commission

with directions that the Commission either deny the certificate or resume a review of the case for specific findings of fact in regard to the net benefits, if any, conferred by the AEP pool agreement in this instance.

We find it impossible as a reviewing Court to know whether the Commission has acted properly in granting this certificate. The power pool agreement is not in the record of this case. Because the power pool agreement is an integral and essential part of the proposed undertaking, the utility's case is deficient to the extent that this basic document is absent. The agreement is frequently mentioned by company witnesses and protestants. The Commission order refers to benefits and responsibilities resulting from the integrated pool system. The rules of evidence provide that when an agreement is central to a controversy, the best evidence is the document itself.

In order to sustain an order of any administrative agency, there must be specific findings of fact. *See Energy Regulatory Commission* v. *Kentucky Power Company*, Ky.App., 605 S.W.2d 46 (1980). When the decision of a Regulatory Commission depends on a determination of fact, the absence of basic evidentiary facts is fatal to such a decision. *Marshall County* v. *So. Central Bell Telephone Co.*, Ky., 519 S.W.2d 616 (1975).

Upon remand, the Commission should have the agreement filed in the record, allow full examination and analysis by its staff and the parties to this matter, and find the facts based on such consideration and other evidence already in the record.

The integrated AEP system pool agreement is crucial to the factual determination by the Commission. The AEP power pool agreement is not an arms length transaction. Although the Consumer Protection Division did not request the agreement prior to the hearing, they did

raise the issue at the hearing but were not permitted to develop the matter. We believe such denial was improvident. It is important for an administrative agency to have all of the necessary facts and information that are available to it to be included in its record. The adversarial nature of hearings before the Public Service Commission must give way to the controlling concern for all the facts so that an impartial and proper determination can be made. Technical questions as to the burden of proof must be resolved in favor of full disclosure before the Commission.

In order to determine on appeal that Kentucky Power is treated fairly in relation to the other members of the AEP pool, it is necessary to have the document of record. It is not enough to have the agreement filed elsewhere as with the FERC. It should be filed in this case with the Kentucky Public Service Commission. The testimony should then be tested against the agreement itself. The result is entirely within the purview of the Commission.

In view of our decision, we do not believe it is necessary to address the other issues raised on appeal.

The order of the circuit court is reversed. This matter is remanded with directions to return the case to the Public Service Commission for a specific finding of fact as to the AEP power pool agreement after it has been placed of record.

ALL CONCUR.

ATTORNEYS FOR APPELLANT:

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

CERTIFICATE

I, Jeanette Mulley, Chief Deputy Clerk, Court of Appeals of Kentucky, do hereby certify that the foregoing Opinion, rendered August 27, 1982, in the case of Steven L. Beshear, etc., vs. Public Service Commission, etc., et al., File No. 82-CA-267-MR, is a true and correct copy as same appears on file in this Court.

DATE: August 5, 1986 /s/ JEANETTE MULLEY,
CHIEF DEPUTY CLERK

I, John P. Hayes, Chief Judge of the Court of Appeals of Kentucky, do hereby certify that Jeanette Mulley, whose signature is affixed to this certificate, is Chief Deputy Clerk of the Court of Appeals, having been appointed on February 1, 1977.

DATE: August 5, 1986 /s/ JOHN P. HAYES,
CHIEF JUDGE

I, Jeanette Mulley, Chief Deputy Clerk of the Court of Appeals, do hereby certify that John P. Hayes, whose signature is affixed above is and has been a Judge of the Court of Appeals of Kentucky since August, 1976.

DATE: August 5, 1986 /s/ JEANETTE MULLEY,
CHIEF DEPUTY CLERK

278.410 Action to review order of commission; institution; answer; injunction

(1) Any party to a commission proceeding or any utility affected by an order of the commission may, within twenty (20) days after being served with the order, or within twenty (20) days after its application for rehearing has been denied by failure of the commission to act, or within twenty (20) days after being served with the final order on rehearing, when a rehearing has been granted, bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Notice of the institution of such action shall be given to all parties of record before the commission.

(2) The answer of the commission shall be served and filed within twenty (20) days after service of the complaint. The action shall then be at issue and stand ready for trial upon ten (10) days' notice to either party, on the equity side of the docket of the court. The answer need not deny verbatim the allegations of the petition, but a general denial thereof on behalf of the commission shall be sufficient.

(3) Injunctive relief may be granted by the circuit court in the manner and upon the terms provided by law.

COMMONWEALTH OF KENTUCKY
COURT OF JUSTICE
FRANKLIN COUNTY CIRCUIT COURT
Judge William Graham

Case No. 84-CI-1760

Kentucky Power Company,
Plaintiff,

vs.

Kentucky Public Service Commission
and
Office of the Attorney General
Consumer Protection Division

Air Products and Chemicals, Inc.
Armco, Inc., Ashland Oil, Inc.
Huntington Alloys, Inc. and Ky. Electric Steel Co.

John Henry Ward, Bert Diamond, Sada Crum and
Concerned Citizens of Martin Co.

Blue Diamond Mining, Inc.,
Defendants.

CIVIL DOCKET ENTRIES

Date	Proceeding
12-21-84	Complaint filed. Summons and 7 copies issued to Parties by certifed mail by the office of Bruce Clark
12-27-84	Certified receipt confirming service on Thomas Emerson for Attorney General on 12/26/84.
	Certified receipt confirming service on

Richard Raff by signature of Joey Travhille on 12/26/84.
Certified receipt confirming service on Michael Beiting by signature of Carmilia Booher on 12/26/84.
Certified receipt confirming service on Bruce Abel on 12/26/84 by signature of Linda Pitstick.

1- 2-85 Answer of Blue Diamond Mining, Inc. filed.

1- 2-85 Certified receipt confirming service on Francis J. Mellen by signature of Candy Hall on 12/28/84.
Certified receipt confirming service on Anthony Martin on 12/27/84.
Certified receipt confirming service on David Rubinstein by signature of Donna Blackburn on 12/31/84.

1- 3-85 Answer of the Attorney General filed.

1- 7-85 Answer of the Defendant, John Henry Ward, et al.

1- 8-85 Answer of the Public Service Commission.

1-11-85 Answer of Air Products and Chemicals, Inc., Armco Inc., Ashland Oil, Inc., Huntington Alloys, Inc. Ky. Electric Steel Co. and Pickands Mather & Co. filed.

1-18-85 Notice, Motion, Order to set briefing schedule.

1-28-85 Notice, Motion, Order for Temporary Injunction.
Summary of Argument.
Memorandum in support of Plaintiff's Motion for Temporary Injunction.

1-30-85 Affidavit of Robert E. Matthews.
Affidavit of Gerald P. Maloney.
Affidavit of Joseph H. Vipperman.
Affidavit of Coulter R. Boyle, III.
Revised Order Scheduling Hearing.

2- 4-85 Response to Motion for Temporary Injunction filed by Atty. Gen.
Memorandum in response to plaintiff's motion for temporary Injunction.

2- 4-85 Response of Residential Intervenors to Motion for Preliminary Hearing.

2- 4-85 Motion for Protective Order.
Memorandum of Air Products and Chemicals, Inc., Armco Inc., Ashland Oil, Inc., Huntington Alloys, Inc., Ky. Electric Steel Company and Picklands Mather & Co. In Opposition to Motion for Preliminary Injunction.
Appendix to Memorandum.
(Sealed Protective Order filed)

2- 5-85 Memorandum of defendant Ky. Public Service in opposition to motion for temporary injunction filed.

2- 7-85 Proposed Findings of Fact and Conclusions of law tendered by Kentucky Power Company.

2- 8-85 Order filed that the motion for temporary injunction is denied.
Copies and certification mailed to David Rubinstein, Anthony G. Martin, Francis J. Mellen, Jr., Richard Northern, Michael R. Beiting, Lively M. Wilson, Bruce F. Clark, F. Bruce Abel, David F. Boehm, James J. Ryan, Wm. M. Sawyer.

3-12-85 Order appointing Connie Sewell as the Official reporter in the action.

3-14-85 Order setting out Briefing Schedule.
Agreed Order Dismissing Blue Diamond Coal Is hereby dismissed as a party defendant.

4-11-85 Brief of Kentucky Power Company filed.

4-19-85 Entry of appearance filed by Wm. P. Curlin, Jr., Hazelrigg & Cox as co-counsel for Ky. Industrial Utility Customers.

4-26-85 Record before PSC filed. (2 boxes in back room)

5- 2-85 Motion for an extension of time to file brief.

5-10-85 Motion for an extension of time to file brief filed by Ky. Industrial Utility Customers.

5-10-85 Order filed that Intervenors shall have 37 days from the date of the filing of Plaintiff's brief in which to file a response. Copies to all parties.

5-13-85 Brief of Appellees John Henry Ward, Et. al.

5-14-85 Brief of the Appellee Attorney General.

5-20-85 Answer brief of Ky. Industrial Utility Customers filed.

5-20-85 Brief of defendants, Ky. Public Service Commission and individually named Commissioners filed.

5-24-85 Motion for extension of time filed by plaintiff.

5-24-85 Order extending time to file reply of plaintiff to and including June 10, 1985.

6- 6-85 Order that the Defendant Ky. Public Service Commission shall have.

6-10-85 Reply Brief of Kentucky Power Company filed.

6-14-85 Transcript of Evidence.

6-27-85 Motion to strike limited portion of reply brief of Ky. Power Co. filed.

7- 1-85 Motion filed by plaintiff to set for oral argument.

7-12-85 Order setting for Oral Argument on July 19, 1985.

7-15-85 Pages substituted into the Reply Brief of Plaintiff.

7-18-85 Supplemental Memorandum of Ky. Industrial Utility Customers.

7-26-85 Kentucky Power's response to Supplemental Memorandum of Kentucky Industrial Utility Customers.

8- 2-85 Order submitted to be tendered by defendants.
Notice of Recent FERC Decision.

8- 2-85 Opinion and order tendered by Kentucky Power.

8-14-85 Joint response of Attorney General and residential intervenors to notice of FERC Decision.

8-14-85 Response of Ky. Industrial Utility Customers to Notice by Ky. Power Company of Recent FERC Decision.

8-16-85 Kentucky Public Service Commission's response to notice of recent FERC Decision.

8-26-85 Order of submission filed. Record submitted to Judge Graham.

8-29-85 Motion for leave to file additional authority and statement of authority filed by plaintiff.

9- 4-85 Response in opposition to plaintiff's motion for leave to file statement of additional authority filed by defendant PSC.

3-24-86 Judgment affirming the Order of the PSC in Case No. 9061 and all relief sought by the Plaintiffs herein is denied. Copies to all parties.

4-18-86 Notice of appeal filed by Kentucky Power, copies to Richard G. Raff, Pamela Johnson, F. Bruce Abel, William P. Curlin, Anthony G. Martin, Bruce Clark and John C. Scott.

4-28-86 Designation of record on appeal filed.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

84-CI-1760

KENTUCKY POWER COMPANY
PLAINTIFF

v.

KENTUCKY PUBLIC SERVICE
COMMISSION, et al.
DEFENDANT

JUDGMENT

(Filed March 24, 1986)

This appeal is before the Franklin Circuit Court on petition of the plaintiff Kentucky Power Company for review of a rate order issued by the Kentucky Public Service Commission on December 4, 1984. The plaintiff Kentucky Power Company moved this Court for temporary injunctive relief from that order, which motion was denied on February 8, 1985. The case is now before the Court for review of the merits of the Commission's order.

FACTUAL HISTORY

This appeal is merely one installment in a rather lengthy controversy before the defendant Commission. Kentucky Power is a wholly owned subsidiary of American Electric Power Company, Inc. (AEP) and is engaged in the business of supplying electric energy to

numerous Kentucky customers. The Kentucky Public Service Commission is vested by Kentucky law with jurisdiction over the company's retail rates.

AEP is a utility holding company and the parent company of numerous utility companies which provide electric energy in several States. The AEP system is a fully integrated interstate utility system.

Beginning around 1978, Kentucy Power sought permission to buy a 15% undivided ownership interest in two large electricity generating plants under construction by Indiana and Michigan Electric (another AEP subsidiary) in Rockport, Indiana. These efforts were not approved by the Public Service Commission or by the Kentucky Appellate Courts.

In September 1981, the Public Service Commission reversed itself and approved Kentucky Power's effort to purchase part of the Rockport plant. On appeal, the Kentucky Court of Appeals reversed that order of the Commission, directing the Commission to make specific findings of fact and to determine other issues. Additional hearings were held by the PSC and again in March 1983, the Commisison approved the purchase of a 15% interest in Rockport by Kentucky Power. That decision by the PSC was reconsidered and new evidence was presented to the Commission. On August 2, 1984, the PSC issued a revised order reversing its previous stand and denying Kentucky Power's application to purchase the 15% share of Rockport. That order was not appealed.

Before the last decision by the PSC, Kentucky Power, Indiana and Michigan, and AEP Generating Company entered into a unit power agreement whereby Kentucky Power agreed to buy 15% of the output of Rockport; this agreement represented the financial equivalent of Kentucky Power owning 15% of Rockport. This agree-

ment required the rate approval of the Federal Energy Regulatory Commission (FERC). FERC approved the rates, subject to refund.

As a basis for its decision the PSC had ruled that Kentucky Power could meet its capacity needs by buying surplus power available to it from the AEP power pool. This was possible because the pool had excess capacity, even without the Rockport plant. The PSC concluded that it was cheaper for Kentucky Power to purchase the needed power from the pool under the Interconnection Agreement as opposed to ownership of Rockport. The Commission found that Kentucky Power had a contractual right to purchase from the pool under the Interconnection Agreement.

On December 4, 1984, the PSC ruled that Kentucky Power acted imprudently in entering the unit power agreement to purchase 15% of the power from Rockport when the same amount of power could be purchased under the pool agreement at a substantially lower cost. This ruling was appealed to this Court.

By order of February 8, 1985, this Court denied the plaintiff Company's motion for injunctive relief on the Rockport issue.

Another issue before the Court involves the construction of a transmission line called the Hanging Rock-Jefferson Line. Kentucky Power, along with its sister companies, Appalachian Power Company, Columbus and Southern Ohio Electric, Indiana and Michigan Electric Company and Ohio Power Company, are all members of the AEP system. The AEP system is highly interconnected through utilization of transmission lines.

In 1974, Kentucky Power applied to the Commission for a certificate authorizing construction of a 155 mile transmission line in Kentucky at a cost of $55 million. The transmission line would connect the Hanging Rock

substation of Ohio Power Company with the Jefferson substation of Indiana and Michigan Electric Company (Hanging Rock-Jefferson line) and would not have any outlets in Kentucky. Kentucky Power told the Commission that other members of the AEP system would pay 95% of the line's construction, operation and maintenance costs. A certificate was granted on that basis.

In 1983, Kentucky Power told the Commission that the Hanging Rock-Jefferson line would be completed in 1984 at a cost of $123 million and that none of the other members would pay for any of its costs. The Commission then initiated Case No. 8904 to investigate Kentucky Power's need for the transmission line and its cost responsibility.

During the course of that investigation the AEP system filed with the FERC a Transmission Agreement whereby AEP subsidiaries whose investment in transmission facilities was below a specified level would pay rates to those subsidiaries whose investment exceed the specified level. Pursuant to this FERC agreement, Kentucky Power's transmission investment entitles it to receive revenues from its sister utilities; there are no rates to be paid by Kentucky Power.

The Commission's order in Case No. 8904 found that while the Hanging Rock-Jefferson line did provide some reliability benefits to Kentucky Power and its customers under certain extreme conditions of low probability, it was built primarily to enable the system to transfer large quantities of power from Ohio to Indiana, i.e., bulk power transfers in interstate markets. The Commission further found that the transmission line greatly exceeded Kentucky Power's intrastate needs and consequently, only a portion of the investment should be included in retail rate base. Utilizing an allocation formula similar to the AEP system's allocation of generating capacity

under the Pool Agreement, the Commission found that only 44% of the investment in the Hanging Rock-Jefferson transmission should be included in retail rate base and only 44% of the operating and maintenance expenses should be charged to retail customers. Kentucky Power's rates in Case No. 9061 were based on the 44% limitation as ordered in investigative Case No. 8904.

FINDINGS OF FACT

(1) The AEP Interconnection Agreement does not contain any provisions that would require KPC to buy power from the Rockport plant at incremental cost for purposes of meeting Kentucky Power Company's (KPC) internal demand.

(2) The AEP Interconnection Agreement specifically allows KPC to purchase needed power from the AEP pool at the embedded cost of power generated by the pool.

(3) The record in the proceedings before the Public Service Commission clearly demonstrates that it is less expensive to purchase power from the pool than it is to purchase power pursuant to AEP's proposed unit power agreement.

(4) The Unit Power Agreement between AEP Co., and KPC is the equivalent of the purchase by KPC of 15% of the Rockport plant.

(5) In its Order of October 1, 1984, in Docket No. ER 84-579-000, the FERC found that ". . . Kentucky Commission has jurisdiction to consider the appropriateness of KEPC's acquisition of new facilities . . .," and that there is ". . . no overlap or conflict . . ." between the regulatory roles of FERC and the Kentucky Commission.

(6) In its Order of November 23, 1984, in Docket

No. ER 84-579-000, FERC found that State commissions, as well as FERC, have legitimate concerns ". . . in determining whether purchases reflect prudently incurred expenses for purposes of determining the purchaser's rates for sales to others." FERC further found that ". . . in this proceeding, we do not intend to make or consider any findings concerning KEP Company's prudence in entering the agreement, in light of the availability of alternative power supplies."

CONCLUSIONS OF LAW

(1) PSC acted within its statutory authority in denying recovery of the Unit Power Agreement costs in light of the contractual right of KPC to purchase power at embedded cost from the AEP pool. See *K.U.* v. *PSC*, Ky. 252 SW 885 (1952).

(2) No confiscation occurs when the PSC rejects for ratemaking purposes excessive or imprudently incurred expenses.

(3) The mere filing of a rate schedule for a Unit Power Agreement with FERC does not preempt the PSC from considering the prudence of KPC in entering into the agreement in light of alternative power supplies, and from denying recovery of excessive costs when they are imprudently incurred.

(4) FERC's interpretation of its authority under the Federal Power Act is entitled to great weight, and sufficient cause to question FERC's interpretation has not been shown.

(5) The PSC Orders complained of are not clearly in conflict with the Federal Power Act.

(6) The Commission's fixing of a value of the Hanging Rock-Jefferson line for retail rate making was just and reasonable and supported by the evidence.

(7) There has been no showing by clear and convincing evidence that the Order of the Commission was unreasonable or unlawful. The Order is supported by substantial evidence in the record.

(8) There is no evidence in the record that the rates set by the Commission are confiscatory.

JUDGMENT

WHEREFORE, the Court ORDERS AND ADJUDGES that the Order of the Public Service Commission in Case No. 9061 is hereby *AFFIRMED* and all relief sought by the plaintiffs herein is *DENIED*.

This is a final and appealable judgment and there is no just cause for delay.

SO ORDERED THIS 21 day of MARCH, 1986.

/s/ WILLIAM L. GRAHAM
Judge, Franklin Circuit Court